

**L.G., Appellant**

**PANAMA CANAL COMMISSION, LOCKS  
DIVISION, Panama City, Panama, Employer**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

### Case Submitted on the Record

Before:

## JURISDICTION

## ISSUES

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the April 15, 2020 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

previously awarded; and (2) whether OWCP properly denied appellant's request for waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 30, 2011 appellant, then a 64-year-old retired senior lock master/lock operations foreman,<sup>4</sup> filed an occupational disease claim (Form CA-2) alleging that he sustained avascular bone necrosis of his left femur due to participating in decompression dives while working as a diver in the Panama Canal. He noted that he first became aware of his claimed condition and its relationship to his federal employment on April 6, 2011. Appellant underwent left hip decompression surgery on November 15, 2010. On April 3, 2012 OWCP accepted his claim for left avascular necrosis.

On April 25, 2012 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to his accepted employment condition.

On May 18, 2012 OWCP expanded the accepted conditions to include left osteoporosis and aseptic necrosis of the head and neck of his left femur.

In December 2012 OWCP referred appellant to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that he provide a permanent impairment rating for appellant's left lower extremity using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup> In a February 13, 2013 report, Dr. Dinenberg applied the diagnosis-based impairment (DBI) method for rating permanent impairment under Table 16-4 (Hip Regional Grid) beginning on page 512 of the sixth edition of the A.M.A., *Guides*. He found that appellant had 28 percent permanent impairment of his left lower extremity due to left avascular necrosis (class 3). Dr. Dinenberg determined that the date of maximum medical improvement (MMI) was February 8, 2013.

In a March 15, 2013 letter, appellant asserted that his pay rate for any schedule award compensation he might receive should include the tropical differential pay he received while he was working in Panama. He alleged that, when he retired effective December 31, 1998, he was earning base pay of \$24.91 per hour and tropical differential pay of \$3.74 per hour (\$24.91 per hour times 15 percent), which equaled \$28.65 per hour. Appellant referenced his receipt of other forms of premium pay, and asserted that his total pay per hour when he retired on December 31, 1998 was \$30.27.

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<sup>3</sup> Docket No. 17-0699 (issued August 9, 2018).

<sup>4</sup> Appellant retired from the employing establishment effective December 31, 1998. Before working as a senior lock master/lock operations foreman, he worked as a diver for the employing establishment from March 1972 through February 9, 1987.

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

Appellant also submitted several documents he felt were relevant to the determination of his pay rate, including his work schedule (displayed in calendar style) from December 1998, the last month he worked for the employing establishment. A March 8, 1987 notification of personnel action (SF-50 form) indicates that effective March 1, 1987 appellant earned “Total Comp” of \$17.97 per hour, which included “Diff 1” pay of \$2.34 per hour. The SF-50 form contains the handwritten notation “tropical differential” with respect to the \$2.34 figure and the handwritten notation “plus night differential, plus Sundays and holidays, plus hazard pay” with respect to the \$17.97 figure. A December 29, 1998 document entitled “retirement information” and produced by the Office of Personnel Management (OPM) indicates that, on January 4, 1998, appellant had an hourly salary of \$28.65 and an annual salary of \$59,792.55.

In a June 21, 2013 report, Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, determined that appellant had 28 percent permanent impairment of his left lower extremity under the sixth edition of the A.M.A., *Guides*. Dr. Slutsky opined that appellant had reached MMI on May 14, 2012.

On September 11, 2013 OWCP received a SF-50 form with the effective date of December 31, 1998, which contains a “Total Comp” figure of \$28.65 per hour, a basic pay figure of \$24.91 per hour, and a “Diff 1” figure of \$3.74 per hour. An undated OPM document indicates that on December 31, 1998 appellant had “base pay” of \$28.65 per hour.

In an undated document entitled “pay rate memo[redacted],” OWCP noted that appellant worked as a diver until February 9, 1987, and then worked as a lock master/lock operations foreman until his retirement from the employing establishment effective December 31, 1998. It advised that he did not lose time for the accepted condition prior to his retirement, but he underwent surgery on November 15, 2010, which was necessitated by the accepted condition. OWCP determined that, therefore, appellant’s pay rate “will be set at [the date disability began] with last federal pay rate.” It noted that the record contained an SF-50 form showing that he earned an hourly base rate of \$24.91 effective December 31, 1998, his retirement date. OWCP indicated that the total pay figure was listed as \$28.65 per hour on both the December 31, 1998 SF-50 form and an OPM Individual Retirement Record (IRR).<sup>6</sup> It asserted that the \$28.65 per hour figure included premium pay, noting that the Panama Canal Commission had closed and it was unable to obtain information that appellant was due additional premium pay. OWCP multiplied the total compensation figure of \$28.65 per hour times 2,087 (work hours in a year) to equal \$59,792.55, and it divided this figure by 52 weeks to equal a weekly pay rate of \$ 1,149.86. It then discussed appellant’s Sunday premium pay, night differential pay, and hazard pay, noting that they were included in the weekly pay rate of \$1,149.86. OWCP indicated that appellant claimed he was entitled to \$3.74 per week for tropical differential pay in addition to his base pay of \$24.91 per week. It asserted that hazard pay was an administrative inclusion to the pay rate, but that there was no entitlement to tropical differential pay.

By decision dated September 16, 2013, OWCP granted appellant a schedule award for 28 percent permanent impairment of his left lower extremity, noting that the award would run for 564.48 days from May 14, 2012 through November 29, 2013 and that the payments would be

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<sup>6</sup> The Board notes that the only OPM document of record at that point, a January 4, 1998 document, listed an “hourly salary” of \$28.65.

based on a pay rate of \$1,149.86 per week.<sup>7</sup> To explain the pay rate calculation, OWCP summarized the discussion it included in the afore-mentioned document entitled “pay rate memo[andum].” It indicated that, although appellant reported that he received tropical differential pay, there was no specific reference to tropical differential pay as a separate differential in employing establishment or OPM records. OWCP considered that tropical differential pay might have been a type of hazard pay, but found that if such were the case “it was already included in the total hazard pay premium.” It noted that there was no description provided to show that tropical differential pay was a statutory inclusion to appellant’s pay rate.

In an October 3, 2013 letter, appellant provided figures, which he claimed accurately reflected his base salary, Sunday premium pay, night differential pay, federal holiday pay, and tropical differential/hazard pay, and he asserted that he should have received his schedule award compensation based on a weekly pay rate of at least \$1,303.63. In a November 11, 2013 letter, he asserted that a May 12, 1967 SF-50 form showed that he was entitled to have tropical differential pay included in his pay rate. Appellant submitted a SF-50 form with the effective date of May 12, 1967 which contains text indicating “Employee entitled to 15 percent Tropical Differential since he is maintaining his own household.” A pay stub for the pay period 25 ending on December 19, 1998 shows “gross pay” of \$2,472.40 for that two-week pay period and “gross pay year to date” of \$67,499.53.

In a February 4, 2014 informational letter, OWCP advised appellant that the documentation he recently submitted was insufficient to establish a higher pay rate for schedule award purposes. It informed appellant that the pay stub he submitted would not establish his pay rate because SF-50 forms and OPM retirement records would contain more accurate information.

On May 12, 2014 appellant underwent OWCP-approved left total hip arthroplasty/replacement surgery. On January 15, 2015 he filed a Form CA-7 seeking an increased schedule award due to his accepted employment conditions.

In a February 9, 2015 report, Dr. Fred I. Ferderigos, a Board-certified orthopedic surgeon serving as an OWCP referral physician, applied the DBI rating method, utilizing Table 16-4 of the sixth edition of the A.M.A., *Guides*, to find that appellant’s left total hip replacement/arthroplasty with good result (Class 2) caused 21 percent permanent impairment of his left lower extremity. On April 1, 2015 Dr. Slutsky, in his role as an OWCP medical adviser, advised that he concurred that appellant had 21 percent permanent impairment of his left lower extremity. He found that the date of MMI was February 9, 2015.

By decision dated April 21, 2015, OWCP found that appellant had 21 percent permanent impairment of his left lower extremity based on Dr. Ferderigos’ February 9, 2015 report and Dr. Slutsky’s April 1, 2015 report. Appellant did not receive any additional schedule award compensation, but the decision listed the same pay rate, \$1,149.86 per week, which was previously used to pay him.

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<sup>7</sup> Appellant received schedule award payments from May 14, 2012 through November 29, 2013 based on this pay rate.

On April 7, 2016 appellant requested reconsideration and noted that he was challenging OWCP's finding regarding the extent of his permanent impairment and its use of the weekly pay rate of \$1,149.86.

OWCP received a January 13, 2015 OPM document indicating that his "high-3 average pay" was \$62,007.00 per year. For 1996, 1997, and 1998, the document listed basic pay earnings derived from annual retirement deductions, which were in turn used to compute high-3 average pay. The basic pay earnings figure listed for 1998 was \$64,977.49 per year. In a September 17, 2015 letter, OPM indicated that it had recalculated appellant's high-3 average pay to be \$62,178.00 per year, rather than \$62,007.00 as previously calculated, because it received a supplemental IRR, which showed that appellant's basic pay earnings figure for 1998 was \$65,490.21 per year, rather than \$64,977.49 as previously calculated.

Appellant submitted excerpts from federal statutes and regulations, including 35 C.F.R. § 251.31, entitled "Tropical differential," which indicated that an "overseas tropical differential" for qualifying employees shall be fixed by the head of each agency in an amount equal to 15 percent of the applicable base wage or salary established under 35 C.F.R. § 251.13.

By decision dated November 21, 2016, OWCP denied modification of its April 21, 2015 decision. It found that appellant had not met his burden of proof to establish more than 21 percent permanent impairment of his left lower extremity and that it properly paid appellant schedule award compensation based on a weekly pay rate of \$1,149.86. OWCP indicated that, although appellant reported that he received tropical differential pay, there was no specific reference to tropical differential pay as a separate differential in employing establishment or OPM records.

Appellant appealed to the Board and, by decision dated August 9, 2018,<sup>8</sup> the Board affirmed OWCP's November 21, 2016 decision with respect to the extent of left lower extremity permanent impairment and set aside the decision with respect to the pay rate for the schedule award.<sup>9</sup> The Board remanded the case to OWCP for development of the pay rate issue, to be followed by a *de novo* decision regarding that issue.

On remand, OWCP created an October 25, 2019 "revised pay rate" memorandum noting a pay rate date of November 15, 2010, *i.e.*, the date disability began due to surgery. It indicated that "absent any likelihood of obtaining any additional information," the \$65,490.21 figure delineated by OPM in a September 17, 2015 letter was representative of appellant's 1998 salary, inclusive of locality pay, but not overtime or premium pay. OWCP found that appellant's proper pay rate for schedule award purposes was \$1,259.43 per week, *i.e.*, \$65,490.21 divided by 52 weeks. It cited the Civil Service Retirement System (CSRS) Handbook from April 1998 (Employee Deductions and Agency Contributions, Chapter 30, Section 30A1.1-2 and Computation of Annuity Under the General Formula, Chapter 50, Section 50A2.1-5), to show that tropical differential and hazard pay were routinely included in the "basic pay" or annual salary figures as presented by OPM. The case record contains relevant excerpts from the CSRS Handbook. OWCP advised that the \$13,090.90 overpayment was calculated by comparing the amount paid from May 14, 2012 through November 29, 2013 for 28 percent permanent impairment of the left lower extremity, \$72,355.68,

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<sup>8</sup> *Supra* note 3.

<sup>9</sup> The Board noted that some of the OPM documentation in the case record suggested a pay rate higher than the \$1,149.86 figure used by OWCP.

with the amount properly due appellant for 21 percent permanent impairment of the left lower extremity, \$59,264.78. It provided financial/payment records, which supported these schedule award payment figures.

By decision dated November 13, 2019, OWCP found that appellant had 21 percent permanent impairment of his left lower extremity based on Dr. Ferderigos' February 9, 2015 report and Dr. Slutsky's April 1, 2015 report. The award used a weekly pay rate of \$1,259.43. OWCP noted that appellant was only entitled to receive \$59,264.78 in schedule award compensation for 21 percent permanent impairment of the left lower extremity, covering the period May 14, 2012 through July 11, 2013. It indicated that appellant had previously received \$72,355.68 in schedule award compensation for 28 percent left lower extremity permanent impairment, and therefore, received a \$13,090.90 overpayment of compensation.

On December 2, 2019 OWCP issued a preliminary overpayment determination finding that appellant received an overpayment of schedule award compensation in the amount of \$13,090.90 for the period May 14, 2012 through November 29, 2013, because it has been determined that he had less permanent impairment than previously awarded.<sup>10</sup> It also made a preliminary determination that appellant appeared to be at fault in the creation of this overpayment, because he filed for an additional schedule award for increased impairment, but the medical evidence of record established that he did not have increased impairment. OWCP requested that appellant complete and return an overpayment recovery questionnaire (Form OWCP-20). It requested that he provide supporting financial documentation, including copies of income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support income and expenses. OWCP afforded appellant 30 days to respond.

On January 3, 2020 OWCP received an overpayment action payment form, signed on December 28, 2019, in which appellant contested OWCP's finding of fault and requested waiver of recovery of the overpayment. He requested a hearing before a representative of OWCP's Branch of Hearings and Review. On January 3, 2020, OWCP also received a completed Form OWCP-20, signed on December 28, 2019, in which appellant listed monthly income of \$5,041.00, comprised of \$4,327.00 of his own income and \$714.00 of his wife's Social Security Administration (SSA) benefits.<sup>11</sup> He advised that he had monthly expenses of \$5,111.00, but only listed a single monthly expense on the Form OWCP-20 itself, a monthly payment of \$600.00 for a loan of \$6,069.00. Appellant listed assets in the form of cash on hand, checking account monies, and savings account monies totaling \$7,197.00. He provided an attached document itemizing \$4,511.00 in monthly expenses, including \$154.00 for property tax, \$193.00 for flood insurance, \$87.00 for hurricane/homeowners insurance, \$104.00 for car insurance, \$274.00 for electricity, \$154.00 for water, \$74.00 for medical insurance, \$18.00 for prescriptions, \$20.00 for liners used for a continuous positive airway pressure machine, \$12.00 for automobile membership, and \$3,421.00 for credit card payments. Appellant submitted supportive documentation for above-noted monthly property tax, insurance, medical, automotive, and utility expenses, as well as for the monthly payment for the loan. He submitted a credit card statement, which listed \$3,421.00 in charges. The statement listed a minimum monthly payment of \$113.00. It included a large

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<sup>10</sup> OWCP produced a December 2, 2019 worksheet showing that appellant received \$72,355.68 in schedule award compensation for 28 percent left lower extremity permanent impairment, but should have received only \$59,264.78 in schedule award compensation for 21 percent left lower extremity permanent impairment.

<sup>11</sup> The Board notes that each of appellant's reported financial figures has been rounded to the nearest dollar.

variety of charges including ostensible online shopping, home improvement, dining/groceries, makeup, internet/cable television, and other retailer expenses of an unclear nature (given the limited information/notations provided in the statement).

During a March 9, 2020 telephonic hearing, OWCP's hearing representative requested that appellant provide an updated outline of his expenses (such as food and clothing) to establish the extent to which the \$3,241.00 credit card statement included ordinary and necessary expenses. Following the hearing, appellant submitted a March 29, 2020 statement in which he indicated that supporting financial documentation was attached, but no such documentation was added to the case record. He maintained that "in order to stay out of debt I have sold personal items, *i.e.*, fishing equipment, free diving equipment, firearms, and a 21 foot boat." Appellant asserted that the schedule award money "was used to help our grandchildren in college." He referenced several household expenses due to flooding, and indicated that "[w]ithout the award money the restoration needed for our home could not have been accomplished without debt."

By decision dated April 15, 2020, OWCP's hearing representative determined that appellant received an overpayment of compensation in the amount of \$13,090.90 for the period May 14, 2012 through November 29, 2013. She found that the overpayment was created because appellant received a schedule award for 28 percent permanent impairment when he was only entitled to a schedule award for 21 percent permanent impairment. It was determined that the weekly pay rate of \$1,259.43 was properly representative of the pay rate when disability began based on the preponderance of evidence of record. The hearing representative found that appellant was without fault in the creation of the overpayment because he could not have known that the amount of his schedule award "would later be rated at less than that paid." She also found that appellant did not submit the requested additional financial documentation and he did not show that the \$3,241.00 monthly credit card bill included ordinary and necessary monthly expenditures, as opposed to large discretionary spending amounts. The hearing representative found that appellant had not established his assertion that his selling of recreational items was supportive of his need of substantially all of his income to meet monthly expenses. Appellant also failed to establish his detrimental reliance argument that he utilized the schedule award money to perform repairs on his home due to flooding or for other claimed purposes. There was no indication that either the homeowners' insurance and/or flood insurance, for which appellant claimed monthly expenses, would not have covered such expenses. The hearing representative required recovery of the overpayment through payments of \$300.00 every 28 days.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA<sup>12</sup> provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.<sup>13</sup> Section 8129(a) of FECA provides that, "when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."<sup>14</sup> Section 8116(a) of FECA provides that while an employee

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<sup>12</sup> 5 U.S.C. § 8101 *et seq.*

<sup>13</sup> *Id.* at § 8102(a).

<sup>14</sup> *Id.* at § 8129(a).

is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.<sup>15</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$13,090.90 for the period May 14, 2012 through November 29, 2013, for which he was without fault.

In the present case, appellant received \$72,355.68 in schedule award compensation for 28 percent permanent impairment of the left lower extremity, covering the period May 14, 2012 through November 29, 2013, when he was only entitled to receive \$59,264.78 for 21 percent permanent impairment of the left lower extremity. The difference between these two figures is \$13,090.90, the amount of the overpayment. In its August 9, 2018 decision, the Board affirmed OWCP's determination that appellant had 21 percent permanent impairment of the left lower extremity and the issue of the extent of the permanent impairment of appellant's left lower extremity is *res judicata* in the present case.<sup>16</sup> The Board further finds that OWCP properly determined that appellant's compensation for 21 percent permanent impairment of the left lower extremity should be based on a weekly pay rate of \$1,259.43 per week. In a September 17, 2015 letter, OPM indicated that it had received a supplemental IRR, which showed that appellant's basic pay earnings figure for 1998 were \$65,490.21 per year, rather than \$64,977.49 as previously calculated. The figure of \$65,490.21 divided by 52 weeks equals the pay rate figure of \$1,259.43 per week. This represents the highest yearly salary figure for 1998 identified in the case record that is supported by probative and reliable evidence, *i.e.*, OPM documentation,<sup>17</sup> and OWCP properly based the date of the pay rate on appellant's salary in late-1998. Appellant retired effective December 31, 1998, but did not suffer disability due to his accepted employment injuries until he underwent OWCP-authorized surgery in 2010.<sup>18</sup> Therefore, OWCP properly chose late-1998, the date appellant last had earnings in federal employment, to fix the date of the pay rate for schedule award purposes.

Appellant repeatedly argued that OWCP's pay rate for schedule award purposes was improper because the various annual salary figures found in the documentation of record failed to include various types of pay, particularly tropical differential pay and hazard pay. In its August 9,

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<sup>15</sup> *Id.* at § 8116(a).

<sup>16</sup> The Board has final authority to determine questions of law and fact, and its determinations are binding upon OWCP. A decision of the Board is final upon the expiration of 30 days following the date of its order and, in the absence of new review by the Director, the subject matter is *res judicata* and not subject to further consideration by the Board. *See V.R.*, Docket No. 20-0689 (issued February 5, 2021); *L.C.*, Docket No. 09-1816 (issued March 17, 2010); *Paul Raymond Kuyoth*, 27 ECAB 498, 503-04 (1976); *Anthony Greco*, 3 ECAB 84 (1949). *See also* 20 C.F.R. § 501.6(d).

<sup>17</sup> OWCP properly found that a pay stub of record from late-1989, which contained a slightly higher annual salary figure, was vague in nature and not as reliable as the above-noted OPM documentation.

<sup>18</sup> Section 8101(4) of FECA defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...." 5 U.S.C. § 8101(4).

2018 decision, the Board remanded the case to OWCP for further development of this issue. On remand, OWCP presented evidence, including excerpts from a CSRS Handbook from 1998, to show that the \$65,490.21 figure utilized in pay rate calculations did not exclude certain types of pay, such as tropical differential pay or hazard pay, as alleged by appellant. Appellant has not submitted convincing, probative evidence demonstrating that OWCP's pay rate calculations for schedule award purposes were improper.

As explained above, appellant received \$72,355.68 in schedule award compensation, but was only entitled to receive \$59,264.78. Therefore, the Board finds that OWCP properly determined that appellant received a \$13,090.90 overpayment.

### **LEGAL PRECEDENT -- ISSUE 2**

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.<sup>19</sup> Section 8129 of FECA<sup>20</sup> provides that an overpayment must be recovered unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience." Thus, a finding that appellant was without fault does not automatically result in waiver of recovery of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.<sup>21</sup>

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.<sup>22</sup> An individual's liquid assets include, but are not limited to, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies, vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401(k)), jewelry, and artwork.<sup>23</sup>

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<sup>19</sup> See *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *P.J.*, Docket No. 18-0248 (issued August 14, 2018); *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>20</sup> 5 U.S.C. § 8129(1)-(b); *A.C.*, Docket No. 18-1550 (issued February 21, 2019); see *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

<sup>21</sup> *A.C.*, *id.*; see *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

<sup>22</sup> 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020). OWCP's procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent, plus \$1,200.00 for each additional dependent. *Id.* at Chapter 6.400.4a(2).

<sup>23</sup> *Id.* at Chapter 6.400.4b(3)(a), (b).

According to 20 C.F.R. § 10.437 recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>24</sup> To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>25</sup> Section 10.438 of OWCP's regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>26</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment of recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>27</sup> Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base.

As properly determined by OWCP, appellant's monthly income of \$5,041.11 exceeds his monthly ordinary and necessary expenses by well over \$50.00. As properly found by OWCP's hearing representative, appellant claimed \$5,111.32 in monthly expenses, but only submitted supporting documentation for a small percentage of this amount.<sup>28</sup> Significantly, appellant did not provide with particularity his claim that he had a monthly credit card payment of \$3,421.00, which primarily consisted of current ordinary and necessary living expenses, despite being provided an opportunity to do so. As his current income exceeds his current ordinary and necessary living expenses by more than \$50.00, appellant has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses.<sup>29</sup> Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the

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<sup>24</sup> 20 C.F.R. § 10.437(a), (b).

<sup>25</sup> *Id.* at § 10.437(b)(1).

<sup>26</sup> *Id.* at § 10.438.

<sup>27</sup> *Id.* at § 10.436.

<sup>28</sup> OWCP's hearing representative properly found that appellant supported monthly expenses for the monthly payment for the Pentagon Federal Credit Union loan and for the items listed on the attachment to his attachment to the Form OWCP-20, except for the \$3,421.00 in charges delineated on the American Express statement. The supported valid monthly expenses collectively totaled approximately \$1,700.00. The American Express statement showed a monthly minimum payment of \$113.00. However, as noted above, appellant did not adequately respond to OWCP's request to provide clarity regarding the nature of the charges listed on the statement.

<sup>29</sup> *See supra* note 23.

purpose of FECA, it is unnecessary for OWCP to consider the second prong of the test, *i.e.*, whether appellant's assets exceed the allowable resource base.

The Board finds that appellant has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment, which created the overpayment.<sup>30</sup> Appellant presented a detrimental reliance argument, alleging that he used schedule awards monies to pay for flooding damage and his grandchildren's educational expenses, but OWCP's hearing representative properly determined that appellant failed to establish this argument. Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, he has failed to show that OWCP abused its discretion by refusing to waive recovery of the overpayment.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$13,090.90 for the period May 14, 2012 through November 29, 2013, for which he was not at fault. The Board further finds that OWCP properly denied appellant's request for waiver of recovery of the overpayment.

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<sup>30</sup> See *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 15, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 4, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board